

dismiss, this Court should refer such matters to the FCC under the doctrine of primary jurisdiction. *See also, Ipco Safety Corp. v. Worldcom, Inc.*, 944 F. Supp. 352 (D.N.J. 1996).

Beehive also argues that “[p]rimary jurisdiction does not apply to cases involving the enforcement of an FCC tariff, as opposed to the reasonableness of the tariff.” Beehive Memo. at 28.¹⁵ However, in this case, the issues are not centered on enforcement of the Tariff,¹⁶ but on interpretation of the Tariff and the 1934 and 1996 Acts.¹⁷ Numerous cases have held that interpretation of tariffs and the Communications Act may be referred to the FCC. *See* cases cited in DSMI’s principal brief, pp. 22-26.¹⁸

CONCLUSION

Beehive has failed to rebut DSMI’s arguments for dismissal of the Amended Complaint. Beehive may not challenge the Tariff, because it has already done so before the FCC. DSMI cannot be held to have violated the 1934 or 1996 Acts, because they only affect common carriers and incumbent LECs, and DSMI is not a common carrier or an incumbent LEC. Beehive’s attempt to enforce the 1934 and 1996 Acts

¹⁵ Beehive argues that the Court “can enforce the SMS/800 Tariff to the extent of ordering DSMI to reinstate Beehive as a RespOrg.” Beehive Memo. at 28. However, that is a moot issue, since Beehive has already qualified as a RespOrg, as previously reported to the Court.

¹⁶ Beehive claims that Count VI only involves enforcement of the Tariff. *See* Beehive Memo. at 29-30. However, since Beehive has not identified which Tariff provisions it thinks need to be enforced, there is no basis for the Court to grant the relief requested. If and when Beehive specifies the Tariff provisions it seeks to have enforced, then a question may be presented as to their proper interpretation, which could properly be referred to the FCC.

¹⁷ The reasonableness of DSMI’s actions relative to the Tariff is also in issue. *See* DSMI’s principal memorandum at 23-26.

¹⁸ Beehive asserts that constitutional questions should not be referred to the FCC. DSMI agrees. This Court should determine as a matter of law that Beehive lacks standing to raise its due process claim, because state action is not sufficiently alleged.

against the BOCs fails because they are not parties. Beehive's attempt to have the Court usurp the FCC with respect to the determination of whether DSMI is an impartial entity for administration of the SMS/800 system must be rejected because the Court lacks jurisdiction to perform a function specifically delegated to an administrative agency. Beehive lacks standing to challenge the recovery of costs from non-telecommunications carriers, because it cannot allege injury to itself from that practice. Beehive failed to raise a triable issue with respect to alleged violation of the Tariff, because it could not even cite the applicable Tariff provision on which it relies. Finally, Beehive failed to allege state action sufficient to sustain a due process claim.

For the reasons stated in this memorandum and in DSMI's principal memorandum, the Court should dismiss the Amended Complaint, or in the alternative, refer portions of it to the FCC for resolution under the doctrine of primary jurisdiction.

Dated this 14 day of March, 1997.

RAY, QUINNEY & NEBEKER

By 
Floyd A. Jensen

Attorneys for Database Service Management, Inc.

Certificate of Service

I hereby certify that on this ____ day of March, 1997, I caused a copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDED COUNTERCLAIM OR, IN THE ALTERNATIVE, TO REFER CERTAIN CLAIMS TO THE FEDERAL COMMUNICATIONS COMMISSION, AND TO STAY ACTION PENDING REFERRAL to be hand delivered to the following:

Alan L. Smith
31 L Street, No. 107
Salt Lake City, Utah 84103

and to be mailed by United States mail, postage prepaid, to

David R. Irvine
124 South 600 East, Suite 100
Salt Lake City, Utah 84102

Janet I. Jenson
WILLIAMS & JENSEN
1155 21st St., N.W., Suite 300
Washington, D.C. 20036

SMS/800 FUNCTIONS**2. General Regulations (Cont'd)****2.1 Undertaking of the Company (Cont'd)****2.1.8 Refusal and Discontinuance of Service****(A) When Service May Be Refused or Discontinued**

If a Resp Org fails to comply with 2.2, 2.3.2, 2.3.4 or 2.4.1 following, including any payments to be made by it on the dates and times herein specified, the Company may, on thirty (30) days written notice by Certified U.S. Mail to the person designated by that Resp Org to receive such notices of noncompliance, discontinue service and/or refuse additional service to the noncomplying Resp Org at any time thereafter. In the case of discontinuance, all applicable charges shall become due. If the Company does not refuse additional service on the date specified in the thirty (30) days notice, and the Resp Org's noncompliance continues, nothing contained herein shall preclude the Company's right to discontinue service and/or refuse additional service to the noncomplying Resp Org without further notice.

(B) Transfer of Responsibilities When a Resp Org's Service Is Discontinued

- (1) If a Resp Org is denied SMS/800 access, or of its own volition ceases providing Resp Org services, the Resp Org is responsible for notifying its 800 subscribers that it will no longer provide those services and that the 800 subscribers must choose a new Resp Org within fifteen (15) business days. The Resp Org must provide written proof to the Company of such notification.
- (2) If a Resp Org is suddenly unable to continue functioning as a Resp Org, the Resp Org must provide the Company with sufficient 800 subscriber account information to allow for subscriber notification of the requirement to choose a new Resp Org within fifteen (15) business days.
- (3) If an 800 subscriber required to choose a new Resp Org, as set forth in (1) or (2) preceding, fails to do so within fifteen (15) business days, the subscriber's account will be allocated to another Resp Org.

SMS/800 FUNCTIONS

2. General Regulations (Cont'd)

2.1 Undertaking of the Company (Cont'd)

2.1.8 Refusal and Discontinuance of Service (Cont'd)

(C) Allocation of 800 Subscriber Accounts to Other Resp Orgs

Subscriber accounts which must be reassigned as described in (B) preceding will be apportioned among participating Resp Orgs according to relative 800 numbers served. To participate in this process, a Resp Org must agree to serve all 800 subscribers allocated to it irrespective of the subscriber's location or area of service. In addition, the Resp Org must provide the Company with a written plan for contacting newly allocated 800 subscribers, and proof on demand that those subscribers have been contacted within seven (7) days after notification of the allocation is made by the Company to the Resp Org.

2.2 Use

2.2.1 Limitations on Use

The Resp Org will not perform any functions using the SMS/800 which are not expressly provided for under this tariff, nor will the Resp Org access data contained in the SMS/800 which belongs to any other entity. Any violation of this paragraph may result in immediate termination of service by the Company.

2.2.2 Unlawful Use

The services provided under this tariff may not be used for any unlawful purpose.

SMS/800 FUNCTIONS**2. General Regulations (Cont'd)****2.4 Payment Arrangements and Credit Allowances (Cont'd)****2.4.1 Payment Arrangements (Cont'd)**

- (I) In case of disputes regarding billing rendered by the Company, the Resp Org shall pay the undisputed amount in accordance with the provisions of (D) preceding and shall immediately thereafter negotiate in good faith with the Company a resolution of the amount in dispute. When the dispute is resolved, the Resp Org or the Company, whichever is applicable shall pay to the other the amount determined to be properly due and owing, together with interest from the original date. Such interest shall be calculated in the manner specified in (D) preceding.
- (J) For purposes of administering this tariff, all months are assumed to have 30 days. Adjustments for the quantities of services established or discontinued in any billing period beyond the minimum period set forth for services in other sections of this tariff will be prorated to the number of days or major fraction of days based on a 30 day month. Unless specified otherwise, "day" refers to calendar day.
- (K) The Company will, upon request and if available, furnish such detailed information as may reasonably be required for verification of any bill.

2.4.2 Credit Allowance for Service Interruption**(A) General**

A service is interrupted when it becomes unusable to the Resp Org. For purposes of this tariff, service interruptions shall be considered to be those instances where the Resp Org is unable to access the SMS/800 during a continuous three hour period, except for those periods of scheduled downtime as specified in 2.1.6 preceding, provided such failure to access is caused by the SMS/800 and not the data links connecting the Resp Org to the SMS/800.

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Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

DATABASE SERVICE
MANAGEMENT, INC., a New Jersey
Corporation,

Plaintiff,

v.

BEEHIVE TELEPHONE COMPANY,
INC., a Utah Corporation,

Defendant.

**SUPPLEMENTAL
MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS
AMENDED COUNTERCLAIM
OR, IN THE ALTERNATIVE,
TO REFER CERTAIN CLAIMS
TO THE FEDERAL
COMMUNICATIONS
COMMISSION, AND TO STAY
ACTION PENDING REFERRAL**

Civil No. 2:96 CV 0188J

Judge Bruce S. Jenkins

Pursuant to the request of the Court at the hearing on March 17, 1997, Plaintiff Database Service Management, Inc. ("DSMI") submits the following supplemental memorandum to clarify the factual and legal background concerning the original assignment to Defendant Beehive Telephone Co. ("Beehive") of the 10,000 "800" numbers at issue in this action.

FACTS

1. In 1989, Beehive requested assignment from Bell Communications Research, Inc. ("Bellcore") of the 10,000 "800" numbers starting with the prefix "629."

See Testimony of Art Brothers, 6/13/96 Tr. at 9, 39, attached hereto as Exhibit "1." Although no record of Beehive's written application has been found, a copy of an undated verification that the 800-629 number code had been assigned to Beehive (apparently signed by Mr. Brothers) is attached hereto as Exhibit "2."

2. At the time of Beehive's request, the assignment of 800 numbers was administered by Bellcore as agent for the Bell Operating Companies ("BOCs"). See Aff. of Ronald Conners.

3. The BOCs' authority to administer the assignment of 800 numbers derived from the Plan of Reorganization, which implemented the divestiture of the Bell System. See United States v. Western Electric Co., 552 F. Supp. 331 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983) (modified final judgment); United States v. Western Electric Co., 569 F. Supp. 1057, 1113-18, *aff'd sub. nom. California v. United States*, 464 U.S. 1013, 104 S.Ct. 542, 78 L.Ed2d 719 (1983) (approving the Plan of Reorganization). A copy of the pertinent portion of the Plan of Reorganization (Appendix A, Amendment 33) is attached hereto as Exhibit "3."¹

4. Under the divestiture decree, the Bell Operating Companies were required to develop a database system for operation of the 800 number system. See United States v. American Tel. & Tel. Co., 604 F. Supp. 316 (D.D.C. 1985) (holding that AT&T's database system would not be made available to the Bell Operating Companies, but that the BOCs were entitled to receive AT&T's software, hardware,

¹ The "Central Staff Organization" referred to in the Plan of Reorganization became Bellcore.

and know-how necessary for development of their own database system).²

5. During the interim period between 1986 and 1993, while the BOCs were developing their own database system, the assignment of numbers by Bellcore was performed pursuant to a system known as the "interim 800 NXX plan." Under that plan, Bellcore promulgated guidelines to govern the assignment of 800 NXX codes. Those guidelines are set forth in an attachment to an advisory letter dated December 30, 1985. *See* Affidavit of Ronald Conners, Exhibit A. All carriers that applied for and received an assignment of 800 numbers were required to comply with, and received the assignment of 800 numbers subject to, those guidelines. *See* Affidavit of Ronald Conners. Thus the assignment of numbers to Beehive occurred pursuant to the interim 800 NXX plan guidelines.³

6. The guidelines provide in pertinent part:

2.3 Choice of 800 NXX Codes

....

Exchange and interexchange carriers may request their choice of NXX codes from the unassigned complement. The carriers will make a formal written request to Bellcore, as provided in paragraph 2.4.1, specifying the code(s) of their choice. . . . This provision will apply to the initial and all subsequent NXX code(s) allocated to carriers.

2.3.1 **The NXX(s) is not permanently allocated to an exchange or interexchange carriers, and no proprietary right is implied or intended with respect to the allocated NXX(s).**

....

² The history of 800 number service prior to 1985 is summarized in this case, 604 F. Supp. at 319. A copy of this case is attached hereto as Exhibit "4." *See also, In the Matter of Provision of Access for 800 Service*, 102 F.C.C.2d 1387 (CC Docket 86-10, Jan. 23, 1986).

³ Under the interim 800 NXX plan, it was necessary to assign numbers in blocks of 10,000, because the first three digits following "800" in the dialing sequence for toll-free or WATS service (i.e. 1-800-NXX-XXXX) were used to identify and route a call to a single carrier to which that NXX code had been assigned. *Id.*

2.4 Administrative Procedures for Requesting 800 NXX code assignments

2.4.1 NXX codes may be allocated to exchange and/or interexchange carriers who plan to offer 800 Service. Written requests for 800 NXX codes(s) should be sent on company letterhead to Bellcore at the following address: . . .

2.4.2 Bellcore will send a written confirmation within 10 working days after the code assignments have been made. . . .

(emphasis added)

7. The interim 800 NXX plan was intended to be a temporary system only, that would eventually be replaced by a database system similar to the SMS/800 system. *Id.*, Exhibit A. Indeed, the FCC eventually required that all LECs convert from the NXX system to a database system. *See In the Matter of Provision of Access for 800 Service*, 6 F.C.C.R. 5421, 5425 n. 35 (CC Docket No. 86-10, 1991); 8 F.C.C.R. 1038, 1042-43 (CC Docket 86-10, 1993).

8. The FCC has also made it clear that 800 numbers are intended to be portable, in that the end user may change carriers without having to change numbers. *See, e.g., In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff*, 1996 WL 635667, n. 1 (CC Dockets 93-129 and 86-10, October 28, 1996); *In the Matter of 800 Presubscription Rules for 800 Providers and Responsible Organizations*, 8 F.C.C.R. 7315 (CC Docket No. 86-10, October 13, 1993) (customers of resellers may generally keep their 800 numbers when they change carriers, just as customers of other 800 providers can). Hence, as between a RespOrg and an end user, the end user has a superior right to retain an 800 number.

9. In 1993, the FCC ordered LECs to convert to a data base system and to file tariffs to govern access to the 800 number database. *See In the Matter of 800 Data*

Base Access Tariffs and the 800 Service Management System Tariff, 1996 WL 635667, n. 1 (CC Dockets 93-129 and 86-10, October 28, 1996). Such LEC tariffs typically provide that a customer has no property right in a telephone number.⁴

10. At least as early as 1986, the FCC stated that telephone companies “do not ‘own’ codes or numbers, but rather administer their distribution for the efficient operation of the public switched telephone network.” In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 F.C.C.R. 2910, 2913 (1987) (quoting 59 Rad. Reg. 2d (P&F) 1275, 1284 (1986)).⁵ An interexchange carrier must purchase 800 data base access service from a LEC in order to have 800 traffic routed to it from that LEC’s service area. *Id.* at n. 8.

From the foregoing, several conclusions are undeniable:

1. When the 800-629 block of numbers was assigned to Beehive, it was done pursuant to guidelines that specifically provided that those numbers were not permanently allocated to Beehive, and that no proprietary right is implied or intended by virtue of the allocation. There was no express or implied contract that gave Beehive any permanent right to retain those numbers, much less a property

⁴ For example, the U S WEST tariff provides:

The customer has no property right in the telephone number nor any right to continuance of service through any particular CO [central office] and the Company may change the telephone number or CO designation of a customer whenever it considers it desirable in the conduct of its business.

Exchange and Network Services Tariff, § 2.2.7.1. (Utah Public Service Comm’n)

⁵ While this case dealt with cellular service, it noted with respect to the assignment of NXX codes to cellular carriers as follows:

While we expect telephone companies to provide NXX codes to cellular carriers, we recognize that after several years, if the cellular carrier does not utilize all 10,000 numbers in the NXX block and there is a shortage of telephone numbers for landline subscribers, it may be necessary for the telephone company to regain access to unused numbers for its landline customers.

right in them.

2. At the time of the allocation, Beehive knew or should have known that the allocation of the 800-629 block of numbers was temporary only, that the NXX code system of 800 access would be replaced by a database system, and that 800 numbers would become portable, meaning that a RespOrg that reserved certain 800 numbers had no guarantee of being able to retain them indefinitely.

3. National telecommunications policy clearly disfavors warehousing of 800 numbers; rather, it favors a policy that 800 numbers should be available on a first-come, first served basis.⁶ Therefore, Beehive's purpose in this action—to recapture the specific 10,000 800 numbers that once were assigned to it—is inimical to the public interest.

In summary, the development of the 800 number system, and in particular the circumstances under which Beehive acquired the 800 numbers in question, necessarily lead to the conclusion that Beehive never had a permanent or proprietary right to those numbers, nor even a reasonable expectation of such. Therefore, there is no basis on which Beehive can legitimately claim a superior right to have those numbers "restored" to it. To reserve such numbers, Beehive must apply for them on an equal footing with all other RespOrgs.

⁶ This same policy has been adopted by the FCC with respect to 888 numbers. See In the Matter of Toll Free Service Access Codes, 11 F.C.C.R. 2496 (CC Docket No. 95-155, January 25, 1996).

The SMS/800 tariff permits the reservation of 800 numbers for no more than 60 days "on behalf of a subscriber." SMS/800 Tariff § 2.3.1(A)(3). It also limits the number of 800 numbers that can be reserved by a RespOrg at any given time to 3,000 numbers, or 15% of its total quantity of working 80 numbers, whichever is greater. See SMS/800 Tariff § 2.3.1(A)(4).

Dated this 24th day of March, 1997.

RAY, QUINNEY & NEBEKER

By 
Floyd A. Jensen
Attorneys for Database Service Management, Inc.

Certificate of Service

I hereby certify that on the 25th day of March, 1997, I caused a copy of the foregoing SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDED COUNTERCLAIM OR, IN THE ALTERNATIVE, TO REFER CERTAIN CLAIMS TO THE FEDERAL COMMUNICATIONS COMMISSION, AND TO STAY ACTION PENDING REFERRAL to be mailed by United States mail, postage prepaid, to

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Washington, D.C. 20036

and to be hand delivered to the following:

Alan L. Smith
31 L Street, No. 107
Salt Lake City, Utah 84103



IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

DATABASE SERVICE MANAGEMENT,
INC., A NEW JERSEY CORPORATION,

CIVIL NO. 96-CV-188J

PLAINTIFF,

VS.

BEEHIVE TELEPHONE COMPANY,
INC., A UTAH CORPORATION,

SALT LAKE CITY, UTAH
JUNE 13, 1996

DEFENDANT.

TRANSCRIPT OF MOTION FOR TEMPORARY RESTRAINING ORDER
BEFORE THE HONORABLE BRUCE S. JENKINS
UNITED STATES DISTRICT JUDGE

COPY

1 SO IF YOU WANT TO MAKE A FREE CALL SOMEWHERE, YOU DIAL
2 800 INFORMATION OR--IF THEY HAVE AN 800 NUMBER, IT WON'T COST
3 THE CALLER. THAT'S THE WHOLE IDEA. IT'S A MARKETING TOOL
4 PRIMARILY. IT'S CHEAPER FOR BUSINESS TO CALL AND LET THEM PAY
5 THE COST OF THE CALL.

6 Q IF THE CALLER DOESN'T PAY THE CHARGE, THEN WHO DOES?

7 A SOMEONE ELSE WHO HAS AGREED TO PAY THAT BILL.

8 Q WHEN DID BEEHIVE FIRST BECOME INTERESTED IN 1-800
9 SERVICE?

10 A ABOUT 1988. I'VE ALWAYS BEEN ON THE LOOKOUT FOR WAYS OF
11 THE COMPANY EARNING MONEY BECAUSE WE'RE SO RURAL AND WE'VE GOT
12 SUCH HUGE EXPENSES, OVER \$10,000 PER CUSTOMER, THAT ANYTHING
13 WE CAN DO TO CUT OUR COSTS WE SHOULD DO, AND 800 IS ONE OF
14 THOSE METHODS THAT WAS THOUGHT TO HELP THAT.

15 Q WHEN DID BEEHIVE RECEIVE A BLOCK OF 800 NUMBERS?

16 A I RECEIVED THOSE NUMBERS IN 1989--OR ACTUALLY I WAS
17 ASSIGNED THE OFFICE CODE 629, WHICH WOULD BE 800 629, WHICH IS
18 AUTOMATICALLY A BLOCK OF 10,000 NUMBERS.

19 Q DO YOU RECALL HOW YOU APPLIED FOR AND GOT THOSE NUMBERS?

20 A YEAH. I ASKED BELLCORE, WHO WAS DOING THE
21 ADMINISTRATION FOR THIS FOR THE BELL OPERATING COMPANIES AND
22 WITH THE ACQUIESCENCE OF THE COMMITTEES THAT WERE PUT TOGETHER
23 FROM ALL THE COMPANIES TO DETERMINE THIS STUFF, AND THAT'S THE
24 NUMBER THEY GAVE ME.

25 Q WHAT FACILITIES DID BEEHIVE DEVELOP AND INSTALL IN ORDER

1 Q I UNDERSTAND THAT WHEN YOU HAD THIS BLOCK OF 800 NUMBERS
2 ASSIGNED TO BEEHIVE, THE PURPOSE WAS PRIMARILY TO RESERVE
3 THOSE NUMBERS FOR COMMERCIAL USE, IS THAT RIGHT?

4 A WELL, WHEN--IN 1989 WHEN WE WERE GIVEN THE OFFICE CODE
5 629 BY BELLCORE UPON APPLICATION BY ME, EVERY COMPANY THAT HAD
6 SUCH A BLOCK OF NUMBERS USED THEM ANY WAY THEY SAW FIT, AND
7 BEEHIVE WAS NO DIFFERENT, AND SO WE DID USE THEM AS WE SAW
8 FIT.

9 Q WAS IT YOUR PURPOSE TO SELL THOSE NUMBERS OR THE USE OF
10 THOSE NUMBERS?

11 A OUR PURPOSE IS TO MAKE THOSE NUMBERS AVAILABLE TO
12 CUSTOMERS TO GENERATE INCOME FOR THE COMPANY. I ALLUDED TO
13 THAT IN MY EARLIER TESTIMONY.

14 Q AND HAS BEEHIVE MADE MONEY FROM THE SALE OR USE OF THOSE
15 NUMBERS?

16 A NOT YET. WE'RE EARNING SOME MONEY, BUT WE'VE STILL GOT
17 TO FINISH GETTING TOLL CIRCUITS COMPLETED. I CHECKED WITH
18 U.S. WEST THIS MORNING, AND THEY'RE STILL DELAYING. WE PAID
19 THEM MONEY LAST YEAR, AND WE'RE STILL WAITING FOR CIRCUITS.
20 30 YEARS OF MY LIFE HAS BEEN SPENT WAITING FOR THE BELL
21 COMPANIES.

22 Q MR. BROTHERS, IS IT YOUR UNDERSTANDING THAT BEEHIVE DOES
23 NOT HAVE PROPRIETARY RIGHTS TO THE 10,000 629 NUMBERS?

24 A WELL, I DON'T KNOW HOW TO ANSWER THAT QUESTION. THE
25 NUMBERS ARE ASSIGNED. THEY'RE ANSWERED. THEY'RE USED. AND

Exhibit 2

Return to:
Number Resource Manager
NANP Administration
290 W. Mt. Pleasant Avenue
Room 1B230
Livingston, NJ 07039
201-740-4593

800 and/or 900 Service Code Verification

OK ✓
Carrier Name: Beehive Telephone
Address: ~~2000 E. Sunset, Lake Point, UT 84074~~ Box 518
Contact Name: ~~A. Brothers~~ Wendover, UT 84083
Telephone: ~~801-250-6639~~ 801-234-0111

Assigned 800/900 Code(s):

Code(s) Carrier Identification Code (CIC) *Exchange Carrier

800-629

Nevada Bell
U.S. West
all Utah carriers
Union Tel, Co
CP National Nevada

*Note: List one Exchange Carrier that is providing access to your code(s) in their area.

etc

Above Information has been verified by:

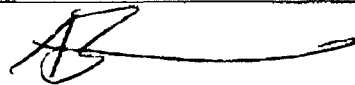
Name:

Title:

Date:

Signed:

we need a 900 & 950
code — how do we apply?



801 234 0111

FAX 801 234 0119

Exhibit 3

d. METHODS AND COMPUTER AIDS TO SUPPORT THE DESIGN OF NETWORK CONFIGURATION

Network planning functions now performed by Bell Telephone Laboratories and AT&T General Departments for the BOCs include service planning, network architecture planning and operation planning. Service planning involves the analysis and economic and technical evaluation of potential new services. Network architecture planning involves the development of methods for maintaining or expanding the network to meet present and future service demands in the most economical manner. Operations planning is the preparation and support of specific operations, engineering and planning tools used by field personnel. Resources and employees will be transferred to the Central Staff Organization from AT&T General Departments and Bell Telephone Laboratories to perform these functions.

c. SPECIFYING PERFORMANCE STANDARDS AND GENERIC EQUIPMENT STANDARDS

Bell Telephone Laboratories and AT&T General Departments develop service performance standards and generic equipment standards for the BOCs. They provide technical specifications for interfaces between the BOCs and inter-exchange carriers, as well as between BOC and customer-owned equipment. In this regard, AT&T General Departments and Bell Telephone Laboratories formulate network compatibility descriptions for existing interfaces, evaluate characteristics for new interfaces and establish performance standards. They also represent the interests of the Bell System in international and domestic forums that develop standards for telecommunications. Further, these groups provide technical leadership for formulating numbering plans, dialing procedures for new and existing services and administering the North American Numbering Plan, and also act as a liaison concerning national and international radio regulations which will affect BOC radio system engineering and operation.

The Central Staff Organization, along with its network planning and facilities planning activities, will perform the

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foregoing activities for the BOCs. Thus, for example, the Central Staff Organization will administer the North American Numbering Plan, including the assignment of 800 codes. (*) Resources, including the technical information relating to establishing interface specifications, and personnel with expertise in these areas will be transferred from AT&T General Departments and Bell Telephone Laboratories to the Central Staff Organization.

As to equipment interconnection, AT&T has established in each BOC one or more Centralized Operations Groups (COGs) as a point of contact to assist non-Bell System vendors of Key and PAX systems in interconnecting their equipment. The BOCs will retain these COGs after divestiture. In addition to the COGs established in the BOCs, employees of AT&T have coordinated the BOCs' COG activities. The assets and personnel associated with this coordinating function will be transferred to the Central Staff Organization.

d. Research in Communications Technology

Bell Telephone Laboratories performs technological research for the BOCs relating to local exchange services in the area of new services, switching, transmission, distribution, customer premises interfaces and computer technology. It also evaluates computer processors and hardware for suitability of BOC use and evaluates and demonstrates new computer hardware and software. A communications laboratory will be established in the Central Staff Organization with sufficient equipment and personnel to perform these kinds of functions for the BOCs, along with any similar activities that may be needed in the future. This will include, among other things, research in the areas of switching, transmission, distribution, computer technology and communications techniques.

e. Procurement

The Decree requires that the BOCs be transferred "sufficient facilities, personnel, systems and rights to technical information" to permit "procurement for" exchange telecommunications and exchange access functions "independently

(*)[Amendment No. 33. Change at the request of the Department of Justice.]

of AT&T" (Decree, § I(A)(1)). This Section of the Plan of Reorganization discusses those transfers.

Certain functions relating to procurement currently are centralized in the Bell System. The Bell System Purchased Products Division in the AT&T General Departments, for example, issues product evaluation reports and generally serves as a clearinghouse for information on general trade suppliers and their products. It also negotiates national purchase contracts with general trade suppliers on behalf of the BOCs and reviews BOC procurement practices to assist in assuring that they purchase the most suitable products at the lowest costs.

Other procurement functions are provided by various other Bell System organizations and entities, including those in the BOCs. Those diversified functions encompass product selection, purchasing and materials management, along with support functions such as purchased products engineering, quality assurance, training and technical information resource management. Employees performing those functions, and the equipment and other assets needed to support them, will be transferred to the regional companies, or to the Central Staff Organization in those cases where the functions are technical in nature and economic benefits result from centralization. There will, however, be no centralized purchasing for the BOCs by the Central Staff Organization, nor will it make recommendations as to particular products.

Because the BOCs already have procurement capabilities, the procurement related transfers to them will often be in the nature of enhancements to existing BOC organizations. Also, because it is important that BOC procurement personnel reflect a broad spectrum of talent, the transfers will not be drawn solely from one Bell System entity; they may come from numerous possible sources.

I. The Procurement Process

Currently, the BOCs make their own procurement decisions; that will not change upon divestiture. Their resources to

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simply setting a price substantially in excess of what it believes to be the fair market value, whether or not it is beyond the franchisee's ability to pay.

Consequently, I cannot accept Arco's assertion that it has made a "true" offer to sell when it has raised the offering price by \$40,000 (16%) over that estimated by its appraiser. Arco argues that Mr. Rocca's estimate did not take into consideration the value of underground tanks and the pumps installed on the premises. I am unconvinced that this accounts for the increase. First, the letter of April 12, 1984, from Shannon to Rocca does not instruct the appraiser to ignore this equipment. Second, Rocca's appraisal report does not specifically exclude the equipment. Third, there has been no evidence of a practice among appraisers to eliminate such equipment from their reports. It may well be that if the property was being appraised for a non-gas station use, tanks and pumps should not be appraised. That, of course, is not the case here. Finally, even if the appraisal did not include the value of the equipment, I cannot say that this omission accounts for the \$40,000 discrepancy. Appended to Shannon's affidavit is a worksheet which sets forth the figures Shannon utilized in arriving at an offering price. According to this sheet, Shannon based the \$290,000 price on the sum of two figures. The first is a dollar-per-square-foot amount, netting a total of \$273,933. To this figure, Shannon added \$17,000 for "Equipment." Presumably this \$17,000 allocation is for the same equipment which was allegedly omitted from Rocca's estimate. It appears that the very agent of Arco who proposed the \$290,000 offer only viewed the equipment to be worth \$17,000.

Arco has simply not articulated to my satisfaction why it chose to increase the price from that suggested by its appraiser. There indeed may be instances in which an appraiser has failed to take into account certain considerations that would justify increasing the offering price over fair market value, but Arco has failed to make that showing here. Similarly, there may be instances in which the offeror's appraiser has

set a price in excess of what would be included in a bona fide offer. However, at this point I need not consider this situation.



UNITED STATES of America, Plaintiff,

v.

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY, et
al., Defendants.

Civ. A. No. 82-0192.

United States District Court,
District of Columbia.

Jan. 9, 1985.

Department of Justice moved for an order that AT&T make available to operating companies on a temporary basis a database system which would enable other interexchange carriers to operate a sophisticated "in-WATS" or "800" system. The District Court, Harold H. Greene, J., held that database system would not be made available to operating companies, but operating companies were entitled to software, hardware, and know-how necessary for development of operating companies' own database systems.

Order accordingly.

1. Monopolies ⇐24(16)

District court which presided over plan implementing general principles of decree by which AT&T accepted divestiture of local telecommunications services and formation of regional operating companies out of divestiture had power to order modifications to plan of reorganization to remedy inconsistencies between plan and decree.

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